



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CRIMINAL APPEAL NO. 43 OF 2017

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 406 of 2012 in the Chief Magistrates Court, Naivasha, E Boke - PM)

R G M.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with incest contrary to Section 20(1) of the Sexual Offences Act, No 3 of 2006. The learned Magistrate found him guilty of the offence which was particularised as follows in the charge sheet that:

“...on diverse dates between 14th and 17th September, 2012 within Nyandarua County, being a male person, caused his penis to penetrate the vagina of M N G a female person who was to his knowledge his daughter.”

He was sentenced to serve life imprisonment.

2. Aggrieved by the decision of the lower court, the Appellant filed an appeal in this court against the whole judgment of the lower court on the following grounds:

“1. That, the learned trial magistrate gravely erred in points of law and facts when she convicted me in this case while not considering that the prosecution side failed to prove to the court for my involvement of the crime in question as no any of my examination medical report was produced before the court to prove their allegations.

2. That, still the learned trial magistrate erred in both law and facts when she convicted me in this case while not considering that the prosecution side failed to avail the crucial vital witnesses before the court i.e. those who made the first report which was contrary under Section 150 of the Criminal Procedure Code.

3. That, the learned trial magistrate erred in both law and facts when she convicted I, the appellant in this case while relying on the single testifying witness without her not warning herself on the dangers basing my conviction on a single testifying witness.

4. That, the learned trial magistrate erred in both law and facts when she convicted I, the appellant in this life sentence when just being well known that the victim was above the age of 10 years and above thus (12 years old) of which I the appellant was prejudiced.

5. That, finally the learned trial magistrate erred in points of law and facts when she rejected my defense without her not properly explaining good reasons for its rejection and thus violated the law provision under Section 169(1) of the Criminal Procedure Code.

6. That, since I can't recall the whole evidence as adduced during the trial, now begs leave of this Hon. Court of justice to furnish me with the court trial proceedings in order to assist me to add more grounds during the hearing of this appeal as well I pray to be present during the hearing of this appeal.”

3. Together with his submissions, the Appellant filed further grounds of appeal as follows:

“1. THAT the learned trial magistrate erred in law by acting on the wrong principles and gave unlawful sentence. The proviso to Section 20(1) of the Sexual Offences Act uses the words that, the accused shall be “liable” to imprisonment for life. The term “liable” does not indicate that life imprisonment is a mandatory sentence.

2. THAT the learned trial magistrate erred in law and fact by convicting the appellant on evidence of penetration which was not proved in evidence.

3. THAT the learned trial magistrate erred in law and fact by convicting the appellant on the basis of assumptions, presumptuous matters, unsettled facts and conclusions un-established by evidence.

4. THAT the learned trial magistrate erred in law and fact by failing to give the appellants defence particularly his defence of Alibi a fair, objective and open-minded analysis and casually rejected the appellant’s defence.”

4. The Appellant, who was self-represented, relied on his written submissions briefly highlighting some evidence that he considered necessary to bring to the court’s attention. Ultimately, he seeks the setting aside of the conviction and sentence and that the Appellant be set at liberty; in the alternative he prays that the sentence be reviewed and the court awards a favourable sentence.

5. The DPP opposes the appeal, and made his oral submissions. He submitted that PW2, the victim, was the appellant’s daughter aged 10 years. From her evidence, the appellant and her mother had separated due to family differences, and mother left the home. She left the victim at home with two younger children and the appellant. She testified that one night the appellant called her and told her to sleep on his bed. He then defiled, and to asked her to return to her bed. PW2 informed her auntie, that is PW3, who informed PW4 and the reported the matter to the police. PW2 was thereafter taken to hospital where the doctor confirmed the defilement.

6. On identification, the DPP submitted that this was properly done and the victims evidence was consistent. On penetration, which the appellant denies, the evidence of the clinical officer PW1 produced a P3 form post-rape case form and treatment card which were marked as exhibit numbers 1,2and 3 respectively. These show that there were injuries around the vulva and a broken hymen.

7. On the question of age, PW6 the investigating officer produced an age assessment report of Joseph Kamau, in which the age was indicated as 10 years. As such this is an issue of incest, as the appellant was the victim’s father.

8. Having carefully considered the submissions of the parties, the record of appeal and the authorities, I consider that the issues for determination are as follows:

- a. *Whether the appellant’s defence of alibi can be sustained, and*
- b. *Whether the investigating officer was entitled to rely on the age assessment report*
- c. *Whether there was penetration*
- d. *Whether life imprisonment is a mandatory sentence*

Defence of Alibi

9. An alibi is a defence by which an accused person says he could not have been present at the commission of an offence or guilty of the allegation made against him, essentially because he was not present or could not have been involved in the circumstances where it was committed.

10. More precisely, “alibi” is defined in the **Cambridge Dictionary** as follows:

“1) proof that someone who is thought to have committed a crime could not have done it, especially the fact or statement that they were in another place at the time it happened:

2) an excuse for something bad or for a failure”

11. From the proceedings, the appellant gave unsworn testimony. He said that on 9/7/2012 he was at home having woken up at 6:30 AM. That on 25/7/12 he took the children to his mother’s house in Nakuru. That after some days, he and his wife woke up in the morning and she went to the kitchen. On that day he was not happy because his wife had not fed the children. The following Saturday and Sunday he was at home, and on returning from church on the Sunday he saw the children seated within the church compound with their grandmother and other women. Later on he saw them run home happily, and they entered the big house. The children began looking for something which they said their mother had sent them for. About that time, he had one of them crying. It turned out to be R W, one of his other children, was unhappy that her mother had left. The following day he brought his wife home to find M N, PW1, the victim, crying. When he asked her what the problem was she said that her leg was peeling. As he was headed to the shopping centre he took note with him and then came back and this left as usual. Three days later he was arrested by three police officers and to headmen. He was told to wait for the chief.

12. The appellant’s story does not dwell on any of the events occurring between the dates when he was alleged to have committed the crime, namely, between 14th and 17 September 2012. His evidence does not therefore set up any alibi, as the dates he refers to in his unsworn evidence relate to July 2012.

13. His explanation in his submissions that PW2, PW3 and PW4 were trying to set him up because of the misunderstandings between him and them separately on different occasions for one reason or the other, and that the incident did not happen at his home but in the forest when the child was fetching firewood, defies belief for being incredible.

14. Now, it is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. The law on alibi has been well established in the case of *Karanja v.R, [1983] KLR 501* where that court stated:

“...We do not accept that the appellant's story amounted to an alibi on the facts of this case, but in any event it is a material factor that when charged initially the appellant did not put forward this story, but contented himself with little more than a denial. Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R v Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in R v Little boy, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought.”

15. Further, as held in *Kossam Ukiru v. R. (2014) eKLR* by Court of Appeal (Azangala, Gatembu and Kantai, JJA.) the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is ascertained that the appellant's guilt has been established. The court said :

“We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see Karanja vs Republic [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it.”

16. The record does not show that the Appellant raised the defence of alibi either from the time of arrest or at any time during the trial. In my view, the defence of alibi was an afterthought because it was not raised at the earliest opportunity to enable the prosecution test it. Further, that defence – even if it lurked somewhere in the Appellant's evidence – was totally out-weighted by the evidence produced by the prosecution.

17. As earlier noted, the accused gave unsworn testimony. The effect of an unsworn evidence was explained in the case of *Josephat Muli Musyimi v Republic [2016] eKLR* where the court, guided by the principle held in *May v. Republic, C.A. Cr Appeal No. 24 of 1979 (1981) KLR 129*: affirmed that:

“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.”

Applying the above principle, I must treat the unsworn evidence of the appellant as having little or no probative value, and is being merely persuasive.

18. For the foregoing reasons, I am unable to accept the appellant's argument that he had an alibi at the time of the commission of the offence for which he was charged.

Whether the investigating officer was entitled to rely on the age assessment report

19. In his submissions, the appellant impugned the judgment in convicting the appellant knowing well that the victim was above the age of 10 years. The wording of his appeal states as follows :

“...when she convicted the appellant in this life sentence.....[it was] well-known that the victim was about the age of 10 years and above thus (12 years old) of which I the appellant was prejudiced”

20. On this issue the evidence was as follows: PW 1, the minor victim, stated that she was ten years old. Her mother T W PW4, said that her daughter was aged ten years at the time of the incident; that she had been with her husband for ten years, and had four children with him, the victim being the eldest.

21. The Investigating Officer PC Peter Mbuvi PW6, gave evidence that he took the victim for age assessment and that he received a report that indicated her age as 12 years. He produced Exhibit 3 the Report he received on victim's age assessment from the RCO Engineer District Hospital ascertaining the victim's age as twelve years old. The court notes that the said report was admitted without objection at the hearing.

22. In the case of *K K K v Republic [2017] eKLR* the court agreed with the prosecution which relied on the case of *Hiram Mwangi Gathonja V Republic*, Nakuru High Court Criminal Appeal Number 44 of 2013. In that case, the court stated as follows: -

“I entirely agree with the appellant's contention that P3 form was produced by PW3, the investigating officer. PW3 also produced the age assessment report showing the child to have been about or 4 years of age together PRC (Post Rape Care Form) all admitted without objection by the appellant. ... Again it is clear to me unless the court deems it necessary (although it is always good practice to do so), failure to call and examine such medical practitioner as to his report is not fatal to the

prosecution's case ...”

23. Guided by the above position, the trial court in the present case stated that:

“The age assessment report was produced by PW4, sergeant Rono. The report by Dr. Mwachai L.G. simply indicates the complainant's age to be six (6) years old. The appellant contends that PW4 is not an expert. The intention of the report was to simply establish the complainant's age. There is the evidence of the mother which also gives the date of birth of the complainant. The trial court also saw the apparent age. There was no need for an expert to produce the age assessment report. The appellant did not object to its production. I do find that there was no miscarriage of justice. The production of the age assessment report by the investigating officer did not cause a miscarriage of justice. It is apparent that the child was below eleven (11) years old which still falls within the bracket of section 8 (1) (2) of the Sexual Offences Act.”

24. I have also looked at the case of **J N O v Republic [2015] eKLR** where it was the position of the court that:

“The age of the complainant was assessed at 13 years, the age assessment report was produced by PW5 who was the investigating officer. The report was produced under Section 77 of the Evidence Act and the same was accepted as evidence.”

Section 77 of the Evidence Act provides that:

“77 (1) In criminal proceedings any document purporting to be a report under the handwriting of a Government Analyst, Medical Practitioner or of any Ballistics expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume the signature of any such document is genuine and that the person signing it or the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit,

(4) Section summon the analyst, ballistics expert, Document Examiner, Medical Practitioner, or Geologist, as the case maybe, and examine him as to the subject matter thereof”.

25. Although Section 77 does not thus deal with the issue as to who can produce such a document it does, however, permit the use of such a document in evidence. It also states that the court may call the maker of that statement to be examined on the same. That is a discretion which the court may or may not exercise. This means that such a document need not be produced by the maker, unless the court opts to summon the maker of the document. As such the document is admissible whether or not the maker comes to court. If the maker comes to court, the evidential value of the document will be much higher as he/she will be subject to cross examination on the same. Production of the age assessment report by an investigating officer is neither illegal nor fatal to the prosecution case especially where it is not contested that the child is below 18years.

26. On the basis of the above discussion, I am able to reach three conclusions. Firstly, that the age of the victim this case is asserted by herself and confirmed by her mother. Secondly, that the age assessment report, which is admissible in law, assessed the victim's age as twelve years old. She is thus deemed in law to be a minor. Finally, and more importantly, the charges against the Appellant were that he committed incest, and the Appellant has nowhere challenged the fact that the victim was his daughter.

Whether penetration was proved

27. The Appellant submitted that there was no proof of penetration, a key ingredient in the offence of incest.

28. The DPP took the court through the evidence that was availed, which the court has analysed from the record. PW1, Frederick Mbugua, the Clinical Officer at Naivasha District Hospital, testified that he examined the complainant and found that her hymen had been broken and the vulva area had injuries. According to the Post rape report which had been filled on the morning of 25 September 2012, there was no discharge from the vagina. Tests were done on the complainant on the same day, but nothing was detected because the incident had taken place on 20 September 2012.

29. PW1 produced exhibits 1, 2 and 3 being the Medical Examination Report form the Post Rape Care (PRC) form and treatment card, respectively. Exhibit 1 shows that the complainant suffered a grievous harm as a result of the defilement, that she had a ***“broken hymen after several times of penetration and painful vulva”***. ***The PRC form recorded that she was complaining of a painful vagina and difficulty in walking”***.

30. PW2, the complainant, testified that the appellant was her father; that he told her to remove her pant; that he removed his trouser; that:

“...he removed his penis; lay on me here (touching her vagina area). He then did bad manners to me in my vagina. I felt pain. He inserted his penis into my vagina. He then ordered me to go back to our bed to our bed”.

31. Under cross examination, PW2 was consistent, although the accused did not ask her questions about the actual assault. She wanted the suggestion that she was out to fetch firewood when he found her crying.

32. PW 3, neighbor and PW4 the complainant's mother, testified that they, separately, saw the complainant walking in a strange way, and when they enquired, the complainant told them about her experience at the hands of her father. PW 4 added that she even checked her daughter's private parts and saw some milkfish discharge coming out of her vagina. She took her daughter to Geta Health Centre where she was examined by a doctor who confirmed that her daughter had been defiled. In cross examination, PW4 admitted that the doctor at the health centre did not find a discharge. However, exhibit 3, the Geta Bush health Centre treatment card discloses that the complainant's hymen was, on examination, found to be broken.

33. I am satisfied from the preponderance of evidence that penetration was proved in this case. There is no basis in the applicant's for any doubt on the basis of the applicant's appeal as to penetration.

Whether life imprisonment is a mandatory sentence

34. The appellant argued that the Magistrate acted against known principles of law and thereby gave an unlawful sentence, in imposing the maximum sentence of life imprisonment. He argues that the proviso to **section 20(1)** of the **Sexual Offences Act** stresses that the accused shall be "liable" to imprisonment for life. He submits that the term "liable" does not suggest that life imprisonment is a mandatory sentence.

35. Section 20 (1) of the Sexual Offences Act provides as follows:

"(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years;

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person".

36. This provision law has been ground for appeal in numerous cases and courts have had occasion to interpret the same. The Court of Appeal in **M K v Republic [2015] eKLR** clearly pronounced itself on the question of length of sentences under the Act as follows:

"15. Readings of the diverse provisions of the Sexual Offences Act reveal that in most sections, a minimum sentence is provided for. For example, under Section 3 (3), a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years....; Section 4 of the Act stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years.... Section 5 (2) of the Act provides that a person convicted of sexual assault shall be liable to imprisonment for a term of not less than ten years.... Section 8 (3) of the Act provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years"

It was the court's opinion that whenever a minimum sentence is imposed, the phrase "not less than" is used. That phrase is not the one used in the proviso to Section 20 (1) of the Sexual Offences Act.

37. The Court of Appeal went further and, guided by the decision in **Opoya v Uganda (1967) EA 752** and the persuasive dicta of **North J. in James v Young 27 Ch. D. at p.655**, stated that it was satisfied that the sentence stipulated in the proviso to **Section 20 (1)** of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment.

38. Read in conjunction with the general provision in **Section 20 (1)** the Court of Appeal stated that the correct interpretation of the proviso in **Section 20 (1)** is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

39. In light of all the foregoing, I am satisfied that the learned Magistrate properly, and on good evidence reached the correct decision. Accordingly, the appeal is hereby dismissed.

40. Orders accordingly.

Dated and Delivered at Naivasha this 27th Day of September, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. R G M in person

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu